DONALD KLEIN
MOZELLE KLEIN

IBLA 82-967 Decided August 16, 1982

Appeal from decision of New Mexico State Office, Bureau of Land Management, declaring unpatented mining claims abandoned and void. NM MC 17838, NM MC 18387, NM MC 20693, NM MC 20694.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim--Mining Claim: Abandonment

   Under 43 U.S.C. § 1744(a) (1976), and 43 CFR 3833.2, the owner of an unpatented mining claim must file for record before Dec. 31 of each calendar year, in the office of local jurisdiction where the location notice of the claim is recorded, evidence of assessment work performed on the claim or a notice of intention to hold the claim, and must also file in the proper Bureau of Land Management office a copy of the instrument filed in the local jurisdiction. Failure to make both filings of the same instrument is deemed to be an abandonment of the claim.

APPEARANCES: Don Klein, Jr., Esq., Albuquerque, New Mexico, for appellants; Gayle E. Manges, Esq., Field Solicitor, Santa Fe, New Mexico, for BLM.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Donald Klein and Mozelle Klein appeal the New Mexico State Office, Bureau of Land Management (BLM), decision of May 13, 1982, which declared the unpatented Sutter's Second, Good Ed, Hill & Dale, and Bagel's Rest lode mining claims, NM MC 17838, NM MC 18387, NM MC 20693, and NM MC 20694, abandoned and

void because no evidence of assessment work or a proper notice of intention to hold the claims was filed with BLM on or before December 30, 1980, as required by section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), and 43 CFR 3833.2.

The Sutter's Second claim was located in 1974, the other three claims were located in March and April of 1978. Examination of the case files shows the initial recording of the notices of location with BLM complied with the requirements of FLPMA. Thereafter, on September 8, 1980, appellants filed a letter with BLM, as follows:

> This letter to advise we plan to keep the following claims:
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> Sutter's Second BLM NM MC #17838, Assessment 1980, 8/25 Misc 125 folio 966, Sandoval Co.
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> Bagel's Rest " #20694 " 8/25 Misc 125, folio 965, Sandoval Co.
> Good Ed " #18387 " 8/25 Misc 125, folio 967, Sandoval Co.
> Hill & Dale " #20693 " 8/25 Misc 125, folio 968, Sandoval Co.
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> These claims are registered under the names of Mozelle or Donald Klein, 7018 Guadalupe Trail, Albuquerque, N.M. 87107.
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> In the past I have sent copy of the Assessment sheets, but it seems that would result in an excessive paper storage over the years, so enter the above information as to intent.

A similar letter was filed with BLM September 29, 1981. There is no indication in the files that either so-called "Notice of Intent to Hold" was recorded in Sandoval County, New Mexico. Appellants have not alleged that either letter was so recorded.

Section 314(a) of FLPMA required that there be filed in the office where the location notice of the unpatented mining claim, is recorded, a notice of intention to hold or an affidavit of assessment work performed thereon, and that a copy of the instrument recorded in the county must be filed with the proper BLM office prior to December 31 of each calendar year. 1/ Section 314(c) provides that the failure to file such instruments

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1/ "Sec. 314. (a) The owner of an unpatented lode or placer mining claim located prior to the date of this Act shall, within the three-year period following the date of the approval of this Act and prior to December 31 of each year thereafter, file the instruments required by paragraphs (1) and (2) of this subsection. The owner of an unpatented lode or placer mining claim located after the date of this Act shall, prior to December 31 or each year following the calendar year in which the said claim was located, file the instruments required by paragraphs (1) and (2) of this subsection: "(1) File for record in the office where the location notice or certificate is recorded either a notice of intention to hold the mining claim (including but not limited to such notices as are provided by law to be filed when there has been a suspension or deferment of annual assessment work), an affidavit of assessment work performed thereon * * *.

as required by subsection (a) shall be deemed conclusively to constitute an abandonment of the mining claim.

BLM took no action until February 1982 when appellants were requested, in a telephone conversation, to submit additional information to conform their 1980 letter to the regulatory requirements for a notice of intention to hold an unpatented mining claim. Appellants responded to the BLM request by sending, on March 11, 1982, copies of the affidavits of assessment work for 1980, as recorded in the records of Sandoval County, New Mexico, August 25, 1980. BLM thereafter issued the decision of May 13, 1982, declaring the claims abandoned and void because the filing, on March 11, 1982, of the proof of labor for 1980 cannot be accepted as a timely filing.

Appellants contend their letter of September 4, 1980, was adequate and timely compliance with section 314 of FLMPA, citing Topaz Beryllium Co. v. United States, 649 F.2d 775 (10th Cir. 1981), for the proposition that only outright failure to file is required to invoke the draconian consequences of section 314(c) of FLPMA. They argue that any deficiencies in their notice of intention to hold should be considered as "curable defects" under the ruling in Topaz Beryllium Co. v. United States, 479 F. Supp. 309 (D. Utah 1979), and Western Mining Council v. Watt, 643 F.2d 261 (9th Cir. 1981). They argue that their one page letter eliminated the need for BLM to store four pages of affidavits of labor.

Appellants concede the Board has held that failure of BLM to advise owners of unpatented mining claims of deficiencies in recordation submissions does not bar the application of the conclusive presumption of abandonment, but they advert to the expression by Government attorneys in the arguments before the Tenth Circuit in Topaz Beryllium that BLM was assisting mining claimants to cure defects in documents submitted for recordation. They suggest that under the doctrine of merger, the affidavits of labor submitted in 1982 should relate back to the letter of September 4, 1980, and thus be considered timely, citing R. Gail Tibbetts, 43 IBLA 21, 86 I.D. 538 (1979).

Appellants argue that BLM is estopped by the Constitution and due process of law to assert any position other than timely acceptance of the affidavits of labor submitted in 1982, at the request of BLM, in view of the assurances to the Court in Topaz Beryllium.

Appellants contend there is no failure to file when the instrument is merely defective, suggesting that Topaz Beryllium supports this position in

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fn. 1 (continued)

"(2) File in the office of the Bureau designated by the Secretary a copy of the official record of the instrument filed or recorded pursuant to paragraph (1) of this subsection, including a description of the location of the mining claim sufficient to locate the claimed lands on the ground.

* * * * * * *

"The failure to file such instruments as required by subsection (a) and (b) shall be deemed conclusively to constitute an abandonment of the mining claim or mill or tunnel site by the owner; but it shall not be considered a failure to file if the instrument is defective or not timely filed for record under other Federal laws permitting filing or recording thereof * * *."

stating "even defective filings put the Secretary on notice." 649 F.2d at 778. They state their letter of September 4, 1980, recited book and page of the recordation of the affidavits of labor.

Appellants argue that the BLM decision is arbitrary, capricious, and denial of due process of law contrary to the interpretation by the Tenth Circuit in Topaz Beryllium. The defects, if any, in their letter of September 4, 1980, do not give rise to the presumption of abandonment.

Counsel for BLM argues that the instruments submitted by appellants are inadequate under the statute and the implementing regulatory standards in 43 CFR 3833.2-2, 3833.2-3. After citing several court cases affirming the recording requirements of section 314 of FLMPA, he concludes that although appellants apparently performed the required assessment work in 1980, they failed to file evidence of such work with BLM within the statutory period.

[1] The filing of the affidavit of assessment work in Sandoval County did not relieve the owners of the claims of the obligation imposed by FLPMA to file timely, i.e., before December 31, 1980, a copy of the recorded instruments with BLM. Under the clear terms of the statute, failure to file the required instrument in the county and a copy of the recorded instrument with BLM within the prescribed time is conclusively deemed to constitute an abandonment of the mining claim. 43 U.S.C. § 1744(c) (1976); 43 CFR 3833.4(a).

It appears that appellants assumed the filing of a letter in lieu of the affidavits of labor would reduce a storage problem for BLM, as well as satisfy the statutory requirements. Actually, BLM was required to make sufficient copies of the letter so that it could be filed in each mining claim case file, so the assumed easing of work for BLM did not occur; rather the work of BLM was increased.

In any event the letter from appellants did not satisfy regulation 43 CFR 3833.2-2(a), which requires the mining claimant to file either an exact legible reproduction or duplicate copy of the affidavit of assessment work performed filed or to be filed in the local jurisdiction of the state where the claim is recorded. By filing the letter, appellants clearly did not provide BLM with the required documents.

The applicable provisions of the statute, 43 U.S.C. § 1744(a)(1) and (a)(2) (1976), require that the mining claimant "file for record in the office where the location notice or certificate is recorded either a notice of intention to hold the mining claim, * * * an affidavit of assessment work performed thereon, or a detailed report provided by section 28-1 of Title 30, relating thereto" and "file in the office of the Bureau * * * a copy of the official record of the instrument filed or recorded." Thus, the regulatory requirements applicable to the instant appeal were mere replications of the statutory provisions, and appellants were required to comply timely therewith.

When appellants failed to file either a copy of the evidence of annual assessment work performed in the BLM State Office, or a notice of intention to hold in the local jurisdiction where the claims were located, the State

Office properly held the claims to have been abandoned and declared them void. Elkins Real Estate, 64 IBLA 141 (1982); Robert W. Hansen, 46 IBLA 93 (1980); see Donald H. Little, 37 IBLA 1 (1978); Paul S. Coupey, 35 IBLA 112 (1978).

We believe appellants err in their interpretation of Topaz Beryllium. The Circuit Court said:

> [1] It is true that certain subparts of 43 C.F.R. § 3833 demand more of a holder of an unpatented claim than does § 1744. 2/ However, 43 C.F.R. § 3833.4(a) does not deem a claim abandoned and void if such supplemental filings are not made. Section 3833.4(a) authorizes such a result only if "an instrument required by §§ 3833.1-2(a), (b), and 3833.2-1" is not filed, and appellants do not allege that §§ 3833.1-2(a), (b), and 3833.2-1 require any more than does § 1744. We conclude that the Secretary has not ignored § 1744(c) which assumes that even defective filings put the Secretary on notice of a claim, and we hold that once on notice, the Secretary cannot deem a claim abandoned merely because the supplemental filings required only by § 3833--and not by the statute--are not made. This is also the Secretary's view: Failure to file the supplemental information is treated by the Secretary as a curable defect. A claimant who fails to file the supplemental information is notified and given thirty days in which to cure the defect. If the defect is not cured, "the filing will be rejected by appealable decision." 3/ The Secretary does not contemplate any automatic extinguishment of a claim for faulty filing. [Emphasis in original.]
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> 2. Appellants challenge 43 C.F.R. §§ 3833.0-5(e), 3833.1(c)(2), 3833.2-2(a)(2) and (b)(2), 3833.2-3(a)(1)(ii) and (b)(2), 3833.0-5(i), 3833.1-2(c)(5) and (6), and 3833.2-3 which require owners of unpatented mining claims to identify themselves to the BLM, to give their address and to give notice of a change of address, to state the legal description assigned to each claim by the BLM, to file amended instruments which change or alter the description of a claim, and to comply with certain standards when submitting a notice of intention to hold a mining claim. None of these "extra" filings are specifically called for by 43 U.S.C. § 1744.
> 3. See Organic Act Directive No. 80-5, "Fatal and Curable Defects of Mining Claim Filings under FLPMA," Oct. 31, 1979. Appellants allege that the Internal Board of Land Appeals (IBLA) is ignoring both the clear meaning of § 3833.4(a) and the cited directive and deeming claims abandoned unless the supplemental information is supplied. Such erroneous decisions by the IBLA can be appealed to federal district court where the interpretation given § 3833.4(a) by this court will be controlling at least in this circuit.

649 F.2d at 778.

In the instant case, the filing of the affidavit of assessment work with BLM was not made. Appellants did not have a faulty filing, they had no filing at all. Under our interpretation of Topaz Beryllium, the claims were subject to the consequences set forth in FLPMA, i.e., conclusive presumption of abandonment.

The Secretary has broad authority to promulgate rules and regulations to aid him in his administration of the public land. 43 U.S.C. § 1475 (1976). In addition, section 310 of FLMPA, 43 U.S.C. § 1740 (1976), directed him to promulgate rules and regulations to carry out the purposes of the Act.

In Topaz Beryllium, the Tenth Circuit stated that certain subparts of 43 CFR Part 3833 demand more of the holder of an unpatented mining claim than does section 1744. But 43 CFR 3833.4(a) authorizes the conclusive presumption of abandonment only "if an instrument required by 43 CFR 3833.1-2(a), (b) and 3833.2-1(a), (b)" is not filed. The Court did not find that 43 CFR 3833.1-2(a), (b) and 3833.2-1 require more than section 1744. The Court held that the Secretary cannot deem claims abandoned merely because the supplemental filings required only by Part 3833 were not made. The failure to file supplemental information is to be treated as a curable defect after notice.

The regulations challenged in Topaz Beryllium were 43 CFR 3833.0-5(e), 3833.1-2(c)(2), 3833.2-2(a)(2) and (b) (2), 3833.2-3(a)(1)(ii) and (b)(2), 3833.0-5(i), 3833.1-2(c)(5) and (6), and 3833.2-3. None of those regulations is applicable to the present situation.

As pointed out above, the statute requires the filing of either a notice of intention to hold the claim or an affidavit of assessment work in the local recording office [County Recorder] and a copy of the recorded instrument in the proper BLM office prior to December 31 of each year. Appellants did not comply with this statutory requirement as to their unpatented mining claims. They filed an affidavit of labor in Sandoval County, but did not submit a copy of the recorded instrument to BLM. Instead they advised BLM in a letter that the evidence of assessment work was recorded in Sandoval County, giving book and page number.

The failure to comply with the statute is not a "curable defect" within the ambit of Topaz Beryllium. The statutory requirement is for a single instrument to be recorded in two places - the County Recorder's office and BLM. Where there is noncompliance with the express statutory requirements, the statutory consequences must ensue. Indeed, the conclusive presumption of abandonment which attends the failure to file an instrument required by 43 U.S.C. § 1744 (1976) is imposed by the statute itself, and would operate even without the regulations. See Northwest Citizens for Wilderness Mining Co., Inc. v. Bureau of Land Management, Civ. No. 78-46 M (D. Mont. June 19, 1979). A matter of law, the conclusive presumption is self-operative and does not depend upon any act or decision of an administrative official. In enacting the statute, Congress did not invest the Secretary of the Interior with authority to waive or excuse noncompliance with the statute, or to afford claimants any relief from the statutory consequences. Lynn Keith, 53 IBLA 192, 88 I.D. 369 (1981).

As the requirements set out in 43 U.S.C. § 1744(a) (1976) were not complied with, there is no authority to accede to the request of appellants that, under the doctrine of merger, the belated submission of the affidavit of assessment work for 1980 on March 11, 1982, be considered as timely relating back to September 8, 1980. The language in 43 U.S.C. § 1744(c) (1976): "[B]ut it shall not be considered a failure to file if the instrument is defective" relates to other Federal laws permitting filing or recording of mining claims, not to the specific requirements of 43 U.S.C. § 1744(a) (1976). R. Gail Tibbetts, supra, which appellants cite as support, held that an amended location notice of a mining claim generally relates back to the date of the original location. That is not the situation here. Nothing in Tibbetts supports the doctrine of relation back for late-filed affidavits of assessment work.

Appellants seem to suggest that BLM was remiss in not advising them of the defect in their so-called notice of intent to hold, early enough for them to have complied with the requirements of FLPMA timely in 1980. The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescence of its officers or agents or by their laches, neglect of duty, failure to act, or delays in the performance of their duties. 43 CFR 1810.3(a). Further, all persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations. 44 U.S.C. §§ 1507, 1515 (1976); Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1974); Donald H. Little, supra. The responsibility for complying with the recordation requirements rested with appellants. This Board has no authority to excuse lack of compliance with the requirements of FLPMA, or to afford any relief from the statutory consequences. Lynn Keith, supra.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Franklin D. Arness
Administrative Judge
Alternate Member